

OGC 72-0534

OGC Has Reviewed

13 April 1972

MEMORANDUM FOR THE RECORD

SUBJECT: U. S. v. IBM (69 Civ. 200 S.D. N.Y.)

1. On 11 April 1972, I attended a meeting in the offices of the DOD General Counsel. Its purpose was to discuss the impact that the disclosure requirements of Pretrial Orders No. 2 and 3 would have on the National Security Agency and this Agency.

Present were:

Fred Buzhardt, DOD/General Counsel
Leonard Niederlehner, DOD/Deputy General Counsel
Calvin Vos, DOD/OGC
Raymond Carlson, Justice/Antitrust Division, Trial
Attorney
Grant Moy, Justice/Antitrust Division

2. At the outset, Buzhardt set the atmosphere that was to prevail throughout the course of the 2 1/2 hour session. He said the Government would be better off to lose this antitrust suit rather than to have the files of its intelligence agencies made subject to the indiscriminate search contemplated by the orders. We gave little credence to the suggestion that protective measures could be devised that would adequately safeguard the information to be found. As evidence of some of the problems involved here and their magnitude, I said that under no circumstances would parties assisting in this litigation be granted access to our files except on the basis of a STATINTL national agency check or a full field investigation. I told Carlson

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3. For the edification of Carlson and Moy, they were given a general briefing on the sensitivity of the intelligence function as it relates to the interests of national defense.

4. In response to Carlson's statement that access to classified documents would be granted only to parties having the appropriate clearances, Buzhardt countered by saying the files of the intelligence agencies could only be made available to cleared parties having a need to know in the interest of national security. In his view, access for purposes of this litigation would not meet that requirement. He then stated that NSA could not comply with Orders No. 2 and 3. He asked that Justice take appropriate action to have it exempted. I stated that the position of this Agency was in all respects identical to that of NSA and that we would require the same consideration. While evidencing some misgivings in anticipation of the Court's reaction to this development, Carlson agreed to make an appropriate oral representation to the Court at the hearings scheduled for 10:00 a.m., Friday, April 14. He stated, however, that he would first make our positions known to Mr. Comegys (Assistant Attorney General, Antitrust Division) and possibly, Mr. Kleindienst. We invited this.

5. It was tentatively agreed that at the April 14 hearing, Carlson is to propose that NSA and CIA be dropped from the proceedings. He is to ask the Court to set a date, not earlier than May 15, for hearing argument which is to be supported by affidavits filed by NSA and this Agency. Buzhardt said that NSA's Director would submit its affidavit. I said that ours would probably be executed by our General Counsel. For guidance in matters of procedure, Carlson is to consult with Kevin Maroney of Justice's Internal Security Division. We identified Maroney as having had some experience in arguing issues of the type that would be involved here.

6. On 14 April, Justice will move for a protective order concerning access to, and the handling of, classified materials and proprietary data. We had taken exception to the order as drafted by Justice. They agreed that it should be made more restrictive. In support of the motion to be made, Buzhardt is to file an affidavit on behalf of DOD.

7. In our subsequent conversation, Buzhardt suggested that we coordinate our efforts to have NSA and this Agency disengaged from this suit. For the present, however, Justice is on notice that we intend to resist becoming involved.

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Assistant General Counsel

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Remarks:

Bill: We cannot say what the outcome will be, but I thought you should know the line we are taking with Defense in the IBM case.

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Lawrence R. Houston

*Suggest you cover at
Morning Meeting periodically.*

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